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BEFORE THE

Supreme Court of the United States

OCTOBER TERM
1959

No. 237

VERA GIOVANNETTI, *Petitioner*,

v.

GEORGETOWN UNIVERSITY HOSPITAL ET AL.

PETITION FOR A REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and presents this petition for rehearing on the petition for a writ of certiorari filed in this case.

JURISDICTION

The petition for certiorari was filed on July 21, 1959 and denied on October 12, 1959. This petition is filed within the time prescribed by the rules of this Court as extended and noted by an order of the Chief Justice dated November 9, 1959 to December 6, 1959.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates each and every ground set forth in the original petition and places special emphasis as to:

1. The ruling of the District Court which is in direct conflict with decisions in other circuits and this Court as it pertains to Rule 41(b) of the Federal Rules of Civil Procedure.

In *Bryan* v. *Smith*, C.A. 7th 1949, 174 F2d 212, the ruling was:

> "After dismissal, the action is no longer pending in the Court and no further proceedings in the action are proper. After dismissal of an action, the Court is without jurisdiction and has no right to render any judgment for or against plaintiff and the parties are out of court for every purpose other than to carry out the order of dismissal or non-suit into effect or vacate or modify it."

This action was contrary to the Court of Appeals order of October 6, 1958 which asked for a *clarification*—when the District Court on October 22, 1958 changed the non-suit and dismissal action without prejudice to one with prejudice for lack of prosecution.

2. The ruling of the District Court which is contrary to the plain meaning of Rule 41 of the F.R.C.P. as it pertains to the rights of a *plaintiff* on a motion for a non-suit or a dismissal without prejudice.

In the case of *Cone* v. *West Virginia Paper Company*, 330 U.S. 212, 91 L.Ed 849, 67 S.Ct. 752, at page 217, Justice Black delivered the opinion of the Court wherein he stated:

> "Take a case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time, a litigant might know or have reason to believe that he could fill the crucial gaps in the evidence. Traditionally, a plaintiff in such a dilemma has unqualified right,

upon prepayment of costs, to take a non-suit in order to file a new action after further preparation unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit. *Pheasants* v. *Fant*, 22 Wall 116, 122; *Jones* v. *S.E.C.*, 298 U.S. 1, 19, 20 and cases cited. Rule 41(a)1 preserves the right of the Plaintiff to a dismissal without prejudice prior to the filing of the defendant's answer. And after the filing of the answer, Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as to the court deems proper.'"[1]

In the instant case now before the Court, the trial court on October 7, 1957—in open court said:

"If plaintiff wants to come in and make a motion to dismiss, I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion. The only motion before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be done and I think it should be clean, without the statement. * * * If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you do not want to do it, we will proceed to trial. * * * I think you had better withdraw your whole statement, that is my suggestion. MR. STEMPEL: It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice. THE COURT: I will grant that motion. (Appendix 5a-6a Petition for writ of certiorari.)

Therefore under this Court's ruling in the *Cone* case,

[1] Rule 41(a)(2) Federal Rules of Civil Procedure has been interpreted as authorizing a plaintiff to dismiss his action "without prejudice" where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." Report of Proposed Amendments to Rules of Civil Procedure (1946) 64; see *United States* v. *Lyman*, 225 F2d 67, 138 F2d 509; *Home Owners Loan Corp.* v. *Huffman*, 134 F2d 314, 317.

supra, it is plain that the petitioner herein was granted a dismissal without prejudice "upon such terms and conditions as the court deemed proper."

Yet on October 22, 1958, the trial court in response to a mandate from the Court of Appeals to clarify the Order of October 8, 1957 by memorandum or order as to how it applied the pertinent Federal Rules of Civil Procedure herein

> ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Federal Rules of Civil Procedure. (App. 13a—Pet. for writ of certiorari.)

Nowhere in the record is there any indication that Plaintiff was guilty of unwillingness to prosecute or to proceed because of want of prosecution.

3. In *Societe Internationale, etc. v. Rogers, Attorney General, etc.*, 357 U.S. 197, 2 L.Ed. 2, 1255, 78 S.Ct. 1087, in an action of certiorari to the United States Court of Appeals for the District of Columbia Circuit, Justice Harlan stated:

> "Because this decision (of the District Court directing final dismissal of the action) raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U.S. 812. * * * Rule 41(b) is concerned with involuntary dismissals and reads in part: For failure of the Plaintiff to prosecute or to comply with these rules or any order of the court, *a defendant* (italics supplied by petitioner) may move for dismissal of an action or a claim against him. * * * There is no need to resort to Rule 41(b) which appears in that part of the rules concerned with *trials* and which lacks such specific references to discovery."

> > "Further, that rule [(41)(b)] is, on its face, appropriate only as a *defendant's* remedy." (Emphasis supplied by petitioner herein.)

> "* * * The opinions of this court in *Hovey* v. *Elliott*, 167 U.S. 409, and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, establish that there are constitutional limitations upon the powers of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. * * * Very certainly, substantial constitutional questions are provoked by such action."

In your petitioner's case, she made the motion to dismiss or non-suit without prejudice since she was unable to prove the case, or what was left of it, as she was limited to by another judge in a previous court hearing, that limitation destroying plaintiff's original complaint against her wishes —but nevertheless the district court, "on terms and conditions as the court deemed proper," on October 8, 1957 dismissed the action without prejudice.

4. The district court's lack of jurisdiction and power to render *any* judgment for or against the plaintiff after the original dismissal of the action "without prejudice."

In *Butler* v. *Eaton*, 141 U.S. 240, 35 L.Ed. 713, 11 S.Ct. 985, anno. 81 ALR 312, 719, the Supreme Court said:

> "The right to have a judgment set aside because it is based upon a judgment which is subsequently reversed is authoritatively recognized. * * * It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed."

By first dismissing without prejudice — which was a final action — and then a year later issuing a new order dismissing with prejudice for want of prosecution under 41(b), the District Court acted beyond the scope of its authority and only this this Honorable Court can set aside that last judgment as void, without any validity, force or effect and secure for the petitioner herein the relief prayed for.

5. Petitioner sought relief under Rule 52(b) of the Federal Rules of Civil Procedure and when the District Court issued a new order on October 22, 1958 dismissing the action with prejudice on the grounds of want of prosecution it was bad law and contrary to decisions in other circuits.

In *Matgas* v. *Faddish*, 9 FR. Serv. 52(b) (1) 4 F.R.D. 385, D.C. M.D. Pa. 1945, the court there ruled:

> "The purpose of Rule 52(b) is to enable the court to amend its findings or make additional findings in order to clarify matters for the appellate court's better understanding of the decision. *It does not provide for a reversal of judgment, or a finding of contrary fact.* * * *"

6. On October 2, 1959, while the petition for a writ of certiorari was being considered by this Court, pursuant to a motion made by petitioner to the Court of Appeals prior to petition filed here—to allow the petitioner to file a motion to reopen or rehear appellant's argument or to order the district court to reinstate the case on the grounds that it issued a void judgment and that the defendant Georgetown University Hospital and Finnerty in violation of the Court of Appeals own rule 32(b)—did not file a brief for appellee yet was allowed to argue the case—the Court of Appeals denied the motion. (Before Wilbur K. Miller, Washington and Burger, Circuit Judges, in chambers, with a note that Circuit Judge Burger did not participate in this order.)

CONCLUSION

For all of the foregoing reasons and with the prayer that the original petition be reread in light of the reasons set forth herein, the petition for rehearing is prayed for now with the hope that it will be granted in the interest of justice and that upon further consideration of the order of

October 12, 1959 denying the petition for a writ of certiorari be revoked, and that a writ of certiorari be issued.

I. William Stempil
Attorney for Petitioner

I, I. William Stempil, of counsel for Vera Giovannetti, the petitioner herein do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

(s) I. William Stempil